The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff, v. DAVID W. TIPPENS, Defendant.	NO. CR16-5110 RJB GOVERNMENT'S RESPONSE TO MOTION TO SUPPRESS

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I. INTRODUCTION

By his own admission, David W. Tippens amassed a massive quantity of child pornography that he had been collecting for years, a fact that was confirmed when the FBI analyzed his digital devices. The case arose from an investigation into Playpen, a massive child pornography bulletin board operating on the anonymous Tor network, and identification of Tippens as one of the members of that site. In his second motion to suppress, Dkt. 127 (Second MTS), Tippens challenges the affidavit supporting the search of his home on two grounds, neither of which justifies suppression.

Contrary to Tippens's assertion, Deputy Shook's affidavit provides ample justification to support the requested search. The affidavit set forth in detail the nature of Playpen: an anonymous forum dedicated to the child pornography trade and the sexual exploitation of children. It detailed the activities of Playpen user "candygirl123," who spent twenty-six hours logged into the site over a three-month period and accessed multiple posts containing images of child sexual abuse. Having linked that user to Tippens's home in Hawaii, the affidavit then explained why there was good reason to believe that a member of Tippens's household was "candygirl123" and a collector of child pornography likely to retain that material for a long time. The magistrate judge therefore quite reasonably concluded there was a fair probability that Tippens's new home in Washington would contain evidence of a crime just one year later. Given the great deference owed that finding, Tippens offers no credible argument for setting it aside.

Tippens's challenge under *Franks v. Delaware* is similarly unavailing. He has made no showing, much less substantial preliminary one, of an intentional or reckless material omission or falsehood. He first claims the affiant misled the magistrate judge when he said that content accessed by "candygirl123" on Playpen was downloaded to that user's computer. But that is exactly what happened. The so-called falsity only arises because Tippens adds his own interpretive gloss that he can then contest and declare to be false. But *Franks* does not countenance rewriting an affidavit to create falsehood where

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there is none. Tippens likewise errs when he says that the affidavit's description of the habits and practices of child pornography collectors is misleading. His argument boils down to his disagreement with the conclusions of the affiant supported by experience and collective law enforcement expertise. Disagreement is not falsity, however, and his claim fails.

Finally, neither the fact that Tippens's moving inventory contained no reference to a computer nor the baseless conclusion of an FBI attorney[1] about the inferences of illegal activity by Tippens's is material to the magistrate judge's determination of probable cause. Nor, as importantly, can Tippens show that the affiant's failure to include these facts in the affidavit was the result of an intent to deceive or reckless disregard for the truth. Tippens has not met his burden under *Franks*, and he is not entitled to a hearing.

Accordingly, for these and the other reasons outlined below, Tippens's motion should be denied.

II. FACTUAL BACKGROUND

The charges here followed an investigation into Playpen, a massive child pornography bulletin board operating on the anonymous Tor network. Tippens was one of the Playpen users identified through the court-authorized NIT that has been the subject of considerable litigation in this case already.[2] In September 2015, Tippens relocated to Washington State, and federal agents obtained a search warrant seeking evidence of child pornography. It is that residential search warrant that is the subject of Tippens's motion to suppress.

[1] Tippens notes the "recent" disclosure of certain discovery, specifically Exhibits C-E attached to his motion. Second MTS at 1 n.1. On December 13, 2016, the government produced 118 pages of discovery from the case file maintained by the FBI field office in Hawaii that initiated the investigation, which is the source of this discovery.

[2] The Court is likely familiar with the Playpen investigation. Where possible, the government has sought to avoid repeating the relevant background and will instead incorporate its earlier briefing and exhibits filed in response to Tippens's first motion to suppress. *See* Dkt. 60, 61, & 62-1.

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A. The nature of Playpen combined with Playpen user "candygirl123's" activities and connection to Tippens's Hawaii home provided ample justification to search his home in Washington.

In his affidavit, Deputy Shook set forth in great detail the bases for his conclusion that there was probable cause to believe that a search of Tippens's residence would result in finding evidence of child pornography offenses. The affidavit clearly and comprehensively described the nature of Playpen, "candygirl123's" activities on the site, that user's ties to Tippens's home in Hawaii, and why there was ample justification to authorize a search of his University Place home.

1. Playpen and its community of members were dedicated to the advertisement and distribution of child pornography.

The affidavit did not equivocate about Playpen: a "website dedicated to the advertisement and distribution of child pornography and the discussion of matters pertinent to the sexual abuse of children, including the safety and security of" perpetrators of such abuse. Dkt. 129, Exhibit B (Shook Affidavit) ¶ 14. After logging into Playpen with a user name and password, members could access any number of forums such as "Jailbait – Boy," "Jailbait – Girl," "Preteen – Boy," "Preteen – Girl, "Pre-teen Videos – Girl HC," "Pre-teen Videos – Boys HC," and "Toddlers." *Id.* ¶¶ 17-18. "HC," the affiant explained, means "hardcore" (*i.e.*, penetrative sexual conduct), and "jailbait" refers to "underage but post-pubescent minors." *Id.* ¶ 18.

The content of the posts in these forums further supports the affidavit's description of Playpen, which contained "discussions about, and numerous images that appeared to depict, child pornography and child erotica" involving "prepubescent girls, boys, and toddlers." *Id.* ¶ 20. The affidavit provided more than just generalities, describing specific posts containing images of prepubescent girls engaged in penetrative oral and anal sex. *Id.* ¶ 21. In total, Playpen contained "thousands of postings and messages containing child pornography images." *Id.* ¶ 22. Finally, in addition to providing an image hosting service its members could use to share child pornography with all

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members, *Id.* ¶ 23, Playpen provided discussion forums for those interested in "methods and tactics to use to perpetrate child sexual abuse." *Id.* ¶ 24.

Not only was Playpen's dedication to the sexual exploitation of children unmistakable, that fact would have been apparent to anyone who saw it. For starters, the nature of Playpen and the Tor network mean that accessing the site would generally have required installation of specific software and knowledge of Playpen's exact web address. *Id.* ¶ 10. That latter point is important because that information would not have been available from a simple web search but most likely from other Playpen users or "online postings describing both its content and location." *Id.* Accessing Playpen thus "required numerous affirmative steps by the user, making it extremely unlikely that any user could have simply stumbled upon" it ignorant of its content. *Id.*

Next, there was Playpen's login page, which prior to February 19, 2015, displayed on either side of the site name "two images depicting partially clothed prepubescent girls with their legs spread apart." *Id.* ¶ 15. On February 19, 2015, just before the FBI seized the site, Playpen's administrator replaced that logo with one displaying a single "prepubescent female, wearing a short dress and black stockings, posed sitting reclined on a chair with her legs crossed, in a sexually suggestive manner." *Id.* n.5. There is more. Underneath that logo (both before and after the change), was the message "'No cross-board reposts, .7z preferred, encrypt filenames, include preview, Peace out.'" *Id.* ¶ 15. As the affidavit explained, "'no cross-board reposts' refers to a prohibition against material that is posted on other websites from being 're-posted' to [Playpen]; and '.7z' refers to a preferred method of compressing large files or sets of files for distribution." *Id.* That logo combined with references to image posting and file compression marked Playpen for exactly what it was—a hub for trading child pornography.

Finally, Playpen's heavy focus on security and anonymity bolsters the conclusion that its members (and its administrators) were well aware of its illicit purpose. "Upon accessing the 'register an account' hyperlink, there was a message that informed users that the forum required new users to enter an email address that looks to be valid.

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However, the message instructed members not to enter a real email address." *Id.* ¶ 16. Indeed, Playpen instructed registrants, "'for your security you should not post information here that can be used to identify you,'" and "provided other recommendations on how to hide the user's identity for the user's own security." *Id.*

Indisputably, Playpen and its members had one goal in mind: to further the sexual exploitation of children through the creation and distribution of child pornography.

2. The activities of Playpen user "candygirl123"and the affiant's knowledge about child pornography collectors showed that evidence of a crime would likely be found in Tippens's home.

Among the Playpen users to whom the NIT was deployed was "candygirl123." Playpen records showed that this user first registered in December 2014, prior to the FBI takeover of the site. *Id.* ¶ 29. Those records also show that between December 2014 and March 2015, "candygirl123" was actively logged into Playpen for a total of twenty-six hours. *Id.*

The affidavit detailed several instances where "candygirl123" logged into Playpen and accessed illicit content. For example, on February 28, 2015, "candygirl123" visited the post "'Latina Anal Part 1 & 2.'" *Id.* ¶ 31. The post contained a link to a video depicting the rape of a toddler and visible thumbnail images showing "a toddler being subjected to various sexual acts, including penetrative sex." *Id.* "candygirl123" also visited the post "'Re: Requested: 8yo fox,'" which contained two images of a prepubescent female under the age of ten. *Id.* ¶ 33. In one, she is "sitting on a bed with her legs spread and her nude genitals exposed to the camera;" in the other, her hands are "'hogtied' . . . [and her] nude genitals and anus are exposed to the camera." *Id.* And "candygirl123" visited a post in the "Pre-teen Videos", "Girls HC" section of Playpen containing an embedded image that is a compilation of 240 individual images showing prepubescent females, including toddlers, engaged in oral and vaginal penetrative sexual activity with adult males. *Id.* ¶ 34. Records also show that "candygirl123" actually clicked on this image while accessing the post. *Id.*

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When the NIT was deployed to user "candygirl123" on February 28, 2015, the resulting information led investigators to Tippens's home. *Id.* ¶¶ 35-36. Specifically, once the FBI obtained the IP address used by "candygirl123," it was able to identify Tippens as the internet subscriber to whom that IP address was assigned. *Id.* At the time, Tippens was living with his mother and two daughters in Hawaii. *Id.* ¶¶ 36-37. In September 2015, Tippens, an active duty soldier, relocated to University Place, Washington, when he was transferred by the army. *Id.* ¶¶ 38-39.[3]

The affidavit went on to explain that given the behavior of "candygirl123" on Playpen, it was probable that Tippens (or another member of his household) accessed and possessed child pornography. And accordingly, the affiant continued, it was probable, given the characteristics that are common among those individuals, that there would be evidence of child pornography offenses in Tippens's home. *See id.* ¶¶ 43-44.

B. Following the issuance of a search warrant for Tippens's University Place home, he was arrested and charged with multiple child pornography offenses.

On February 9, 2016, Deputy Shook appeared before U.S. Magistrate Judge Karen L. Strombom in Tacoma, Washington, to present an application for a search of Tippens's residence, cars, and person. Magistrate Judge Strombom approved the application and issued the requested warrants. *See* MJ16-5025. When federal agents entered Tippens's home on February 11, 2016, he was actively watching a video of a young girl being raped and after confessing to a years-long practice of collecting and storing child pornography, he was taken into custody. Dkt. 1 ¶¶ 10-11. The Grand Jury has since returned an indictment charging Tippens with receipt, possession, and transportation of child pornography.

[3] At the time of the search, Tippens was living in University Place with his daughters. It appears Tippens's mother relocated to Washington State as well but moved out of the area in November 2015. *Id.* ¶ 39.

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III. ARGUMENT

A. Deputy Shook's affidavit clearly and comprehensively established probable cause to support the search of Tippens's home.

The law governing the issuance of warrants is well-settled. Probable cause exists when "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). It is a fluid concept that focuses on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (internal quotation marks omitted).

Critically, probable cause demands no showing of "certainty or even a preponderance of the evidence." *United States v. Gourde*, 440 F.3d 1065, 1069 (9th Cir. 2006) (*en banc*). It requires only a "'fair probability' that contraband or evidence is located in a particular place," a finding that, in turn, depends on "the totality of the circumstances, including reasonable inferences and is a 'common sense, practical question.'" *United States v. Kelley*, 482 F.3d 1047, 1050 (9th Cir. 2007) (quoting *Gourde*, 440 F.3d at 1069). Concededly, reasonable minds may differ regarding whether a particular affidavit establishes probable cause. And so the Supreme Court has long admonished reviewing courts, "the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate judge's determination." *United States v. Leon*, 468 U.S. 897, 914 (1984); *see also Gourde*, 440 F.3d at 1069 ("We are not in a position to flyspeck the affidavit through de novo review.").

Courts (including the Ninth Circuit) have routinely held that membership in a child pornography website, even absent specific evidence that a suspect has downloaded illicit content, will suffice for a finding of probable cause. *Gourde*, 440 F.3d at 1070 (finding probable cause for a residential search based on paid membership in a child pornography site and collecting cases). This is no surprise because "[i]t neither strains logic nor defies common sense to conclude . . . that someone who paid for access for two

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months to a website that actually purveyed child pornography probably had viewed or downloaded such images onto his computer." *Id.* at 1071; *see also United States v. Martin*, 426 F.3d 68, 74-75 (2d Cir. 2005) ("It is common sense that an individual who joins such a [child pornography] site would more than likely download and possess such material"); *United States v. Froman*, 355 F.3d 882, 890-91 (5th Cir. 2004) ("It is common sense that a person who voluntarily joins a [child pornography] group . . . , remains a member of the group for approximately a month without cancelling his subscription, and uses screen names that reflect his interest in child pornography, would download such pornography from the website and have it in his possession.").

Deputy Shook's affidavit unquestionably set for probable cause to support the search of Tippens's home. The affidavit explained in detail the ties between Playpen user "candygirl123" and Tippens's residence and why there was reason to believe "candygirl123" had an active and ongoing interest in collecting images of children being sexually abused. That user spent hours logged into a child pornography site over several months. Logic and common sense, as numerous courts have explained, dictate that it is likely such a person has downloaded and possesses child pornography. Magistrate Judge Strombom was presented with specific, articulable facts and reasonable inferences drawn from training and experience of law enforcement experts. Quite reasonably, she concluded there was a fair probability that evidence of a crime would be found in Tippens's home. And nothing Tippens offers in his motion justifies setting aside that finding.

1. Playpen was a membership bulletin board dedicated to the child pornography trade and the sexual exploitation of children.

Without a doubt, Playpen was dedicated to child pornography and child sexual exploitation. As the affidavit lays out in stark terms, everything from its location and structure to its content mark Playpen for exactly what it was: a hub for trafficking in child pornography and promoting the sexual abuse of children.

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To begin, Playpen was no ordinary website. It operated on an anonymous network. And it was generally accessible only to those who had installed specific software and knew Playpen's exact URL, something most likely obtained from other Playpen users or postings describing its content and location. Shook Affidavit ¶ 10. Playpen was thus not something a user was likely to "stumble upon" unaware of its content. *Id.*

The site's logo and heavy focus on security and anonymity likewise leave little doubt what Playpen was and what its members sought. At login, Playpen members were greeted with a sexually suggestive image of a prepubescent girl. *Id.* ¶ 15 & n.5. The text underneath that logo also admonished members not to post material from other sites and advised them about posting files, including the preferred format for compressing large files for sharing, the need to use encrypted filenames, and an instruction to "include previews." *Id.* Playpen also put a premium on avoiding detection: while it required registrants to enter an email address, Playpen instructed prospective members, "not to enter a *real* email address." *Id.* ¶ 16 (emphasis added). And members were warned, "'for your security you should not post information here that can be used to identify you,'" and "provided other recommendations on how to hide the user's identity for the user's own security." *Id.*

And then there is Playpen's content, which leads to but one conclusion: Playpen was "dedicated to the advertisement and distribution of child pornography." *Id.* ¶ 14. The affidavit did not require the magistrate judge to accept that claim on faith, however. It explained that members could access various forums, including "Preteen – Boy," "Preteen – Girl, "Pre-teen Videos – Girl HC," "Pre-teen Videos – Boys HC," and "Toddlers." *Id.* ¶¶ 17-18. "HC," the affiant explained, means "hardcore" or penetrative sex. *Id.* ¶ 18. Playpen contained "discussions about, and numerous images that appeared to depict, child pornography and child erotica" involving "prepubescent girls, boys, and toddlers." *Id.* ¶ 20. Indeed, the affidavit documented specific posts in which users posted images of prepubescent girls being sexually abused. *Id.* ¶ 21. In total, Playpen contained

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"thousands of postings and messages containing child pornography images." *Id.* ¶ 22. The site even offered an image hosting service to facilitate the trade in illicit images and discussion boards for those seeking tips on how to exploit children. *Id*. ¶¶ 23-24.

In short, the only logical conclusion to be drawn about Playpen is that it and its members were focused on trading child pornography and the sexual abuse of children.

2. "candygirl123's" activity on Playpen and its connection with Tippens's home, combined with the known habits of child pornography collectors, amply supported the magistrate judge's probable cause finding.

Membership in a child pornography site alone supports a finding of probable cause. This is so because membership is both a "small step" and "giant leap," manifesting an "intention and desire to obtain illegal images." *Gourde*, 440 F.3d at 1071. But there is more than membership here. As detailed in the affidavit, Playpen user "candygirl123" joined Playpen in December 2014 and remained a member until the site was taken down in March 2015. Shook Affidavit ¶ 29. Indeed, that user was actively logged into the site for a total of twenty-six hours over that three-month period. *Id.* And unlike in *Gourde*, there is evidence that "candygirl123" actually accessed and viewed images of child pornography. *Id*. ¶¶ 31-34.

It only stands to reason that once "candygirl123's" Playpen activity was tied to Tippens's home, Deputy Shook concluded that it was likely Tippens or another member of his household "displays characteristics common to individuals who access with the intent to view and/or, possess, collect, receive, or distribute child pornography." *Id*. ¶ 44. After all, "candygirl123" joined a website dedicated to the advertisement and distribution of child pornography where "'persons with similar interests can view and download images in relative privacy.'" *See Gourde*, 440 F.3d at 1072. That user then spent many hours actively logged into the site over a period of months and actually accessed child pornography.

This is an important inference because as Deputy Shook explained, there are a number of characteristics that are common to those who seek out child pornography.

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Shook Affidavit ¶ 43. Critically, these characteristics include that such individuals maintain their collections "for several years" because this illicit material is "valued highly." *Id.* ¶ 43(c)-(d). They likewise take affirmative steps to keep their collections (digital and physical) in a place that is secure and "close by" so it is readily accessible. *Id.*

Given all this, Magistrate Judge Strombom quite reasonably concluded there was a fair probability that someone within Tippens home was Playpen user "candygirl123." And that user's Playpen activity, bolstered by the collector profile included in the affidavit, provided ample justification for her conclusion that it was probable that a search of Tippens's home would result in the discovery of evidence of child pornography offenses.

3. Tippens's challenge to the magistrate judge's finding of probable cause utterly fails.

Tippens offers nothing in his motion that would cast doubt on Magistrate Judge Strombom's probable cause determination. Much of Tippens's assault on that finding involves a rehash of his meritless *Franks* challenge (addressed below) and a rather half-hearted claim of staleness. Second MTS at 22-25. Tippens's principal gripe in that regard is that the "prolonged passage of time and the distance between where the alleged connection to Playpen occurred and the search location" renders that evidence stale. Second MTS at 23. The search of Tippens's home occurred within one year of the Playpen activity of user "candygirl123," however. And settled law establishes that in child pornography cases like this one, far longer delays do not render information stale.

"Information underlying a warrant is not stale if there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises." *United States v. Schesso*, 730 F.3d 1040, 1047 (9th Cir. 2013) (internal quotation marks omitted). Like Deputy Shook, the affiant in *Schesso* "explained that individuals who possess, distribute, or trade in child pornography 'rarely, if ever, dispose of sexually explicit images of children' because these images are treated as 'prized

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possessions.'" *Id.* Accordingly, there was ample reason to believe, given the nature of the crime and the evidence sought, that such evidence would still be there "a *mere* 20 months after" the incident giving rise to the investigation. *Id.* (emphasis added). Plainly, if there were ample reason to believe a twenty-month delay does not render information stale, it defies logic that a twelve-month delay would.

Nor, importantly, is the Ninth Circuit an outlier. Numerous courts have reached similar conclusions in child pornography cases. *See, e.g.*, U*nited States v. Allen*, 625 F.3d 830, 842-43 (5th Cir.2010) (finding eighteen-month delay between distribution of child pornography and search warrant insufficient to render information stale); *United States v. Morales–Aldahondo*, 524 F.3d 115, 117-19 (1st Cir.2008) (finding passage of more than three years from when witness reported the defendant purchased access to child pornography websites posed no staleness problem). Indeed, Judge Posner has recently explained that courts must ground "inquiries into 'staleness' and 'collectors' in a realistic understanding of modern computer technology and the usual behavior of its users. Only in the exceptional case should a warrant to search a computer for child pornography be denied on either of those grounds." *United States v. Seiver*, 692 F.3d 774, 778 (7th Cir. 2012).

Magistrate Judge Strombom could reasonably conclude that the information concerning "candygirl123's" activities on Playpen was not rendered stale by the passage of less than a year. There was ample reason to suspect that this user would be at Tippens's residence, the user's activities were ongoing, and that evidence would be found.

B. Tippens has made no showing of an intentional or reckless material misstatement or omission and is not entitled to *Franks* hearing.

To be entitled to a *Franks* hearing, "the defendant must make a non-conclusory and substantial preliminary showing that the affidavit contained actual falsity [or an omission], and that the falsity either was deliberate or resulted from reckless disregard for the truth." *United States v. Prime*, 431 F.3d 1147, 1151 n.1 (9th Cir. 2005) (internal

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quotations omitted); *see also United States v. Meling*, 47 F.3d 1546, 1553 (9th Cir. 1995) (extending the analysis to false inclusions or omissions). A defendant must also demonstrate that the alleged falsity or omission is material. *United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002). A false statement or omission is not material unless the affidavit, purged of its defects, would be insufficient to support a finding of probable cause. *Meling*, 47 F.3d at 1553; *see also United States v. Bennett*, 219 F.3d 1117, 1124 (9th Cir. 2000).

The Supreme Court has stressed that there is a presumption of validity attached to a search warrant affidavit. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). As such, conclusory allegations of a defect will not do. *Id*. at 171. Defendants must offer allegations of intentional falsehood accompanied by an offer of proof; allegations of negligence or innocent mistake are insufficient. *Id*. The Supreme Court has been "careful . . . to avoid creating a rule which would make evidentiary hearings into an affiant's veracity commonplace, obtainable on a bare allegation of bad faith. It crafted, therefore, a rule of very limited scope." *United States v. Chesher*, 678 F.2d 1353, 1360 (9th Cir. 1982).

Tippens identifies two alleged falsities and two omissions, none of which get him over the hump. Regarding the claimed falsehoods, Tippens combines mischaracterization of the affidavit and his self-serving disagreements with law enforcement opinions to create falsity where none exists. As for the omissions, they are utterly immaterial and certainly not the product of intent to mislead or reckless disregard of the truth on the part of Deputy Shook.

1. The affidavit accurately described what happened when "candygirl123" accessed and viewed images of child pornography on the Playpen website.

To begin, Deputy Shook's affidavit accurately described what happened when "candygirl123" accessed certain Playpen content. Shook Affidavit ¶¶ 33-34. There is nothing remarkable or controversial about the notion that images embedded in a webpage

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accessed by a computer "would have been downloaded to the user's computer and displayed on the user's computer screen." *See id.* The website resides on a server, not the user's computer. And the only way for a computer user to access and interact with that website is to have its content available on the user's computer. *See* Ex. A, Declaration of John Powers (Powers Declaration) ¶ 6.

To be sure, it is possible for users to block certain content (*e.g.*, images, internet cookies, etc.) from being downloaded automatically. It is also possible to browse the web wearing a blindfold or with the monitor off. But it would be curious indeed for a member of a child pornography website, even a security conscious one, to join that site and then avoid looking at its illicit content. Magistrate judges have an obligation to be neutral and detached when reviewing an affidavit; they need not divest themselves of commonsense. After all, "the omission rule does not require an affiant to provide general information about every possible theory, no matter how unlikely, that would controvert the affiant's good-faith belief that probable cause existed for the search." *United States v. Craighead*, 539 F.3d 1073, 1081 (9th Cir. 2008).

Deputy Shook made a straightforward assertion about the operation of a web browser. Tippens, however, manages to see beyond mere words, divining the "government's premise" and proclaiming it false. Second MTS at 11. Tippens takes the affiant to task for failing to highlight important differences between the TorBrowser and a more traditional internet browser, particularly the features of TorBrowser that limit storage of web content on the computer's hard drive to protect the user's anonymity. *Id.* at 11-13. The trouble is that the affidavit says only that images embedded in several Playpen posts accessed by "candygirl123" would have been downloaded to that user's computer. It says nothing about where they would be stored or for how long. While criminal defendants are free to challenge the veracity of an affidavit, *Franks* does not give them license to rewrite it to create a falsehood.

Tippens relies heavily on the declaration of Professor Matthew Miller in this regard, but careful inspection shows it does little to advance his cause. For starters,

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Professor Miller may be right that TorBrowser has features intended to limit the degree to which web content accessed through it will be stored on the user's hard drive. Miller Declaration ¶ 6; Powers Declaration ¶¶ 7-9. Professor Miller does not, however, challenge the premise that this content must at least initially be downloaded to the computer and stored somewhere. Miller Declaration ¶¶ 6-7. His point is that the content is not, without affirmative actions by the user, generally stored in a way that it will be readily accessible at a later date. *Id.*; Powers Declaration ¶ 9 (discussing the same feature of TorBrowser). Nothing in the search warrant affidavit is to the contrary. It is thus not Deputy Shook with whom Professor Miller disagrees. Rather, it is Tippens's theory, which he self-servingly ascribes to the affiant when he cannot identify actual falsity in the four corners of the affidavit.[4]

Ultimately, the critical factor supporting the magistrate judge's finding of probable cause was not where the Playpen content was stored or for how long but that "candygirl123" spent twenty-six hours actively logged into a child pornography website over a three- month period. And that same user accessed posts containing images of child sexual abuse. Plainly, there was a fair probability that this user was someone who actively seeks out and collects child pornography and that evidence of those offenses would be found in Tippens's home.

[4] One other matter raised by Professor Miller merits brief attention and clarification. In his declaration, he states that the search warrant affidavit was "incomplete and misleading in some broader respects." Miller Declaration ¶ 8. Specifically, he points to testimony from Professor Brian Levine in which he agreed with the general proposition and the NIT could have made changes to a user's computer and then claims the government has "stipulated that it is possible that its exploit made temporary or permanent changes to the security settings on the computers it was deployed on." *Id.* ¶ 9. That is incorrect. The parties have discussed a potential stipulation addressing this topic. However, the language proposed by the government says nothing about whether the exploit it used could have done this and rather acknowledges that *an* exploit could. Throughout this litigation, the government has never questioned this theoretical possibility. But its position has been unwavering that neither the exploit involved in the Playpen investigation nor any other computer code related to the deployment or execution of the NIT made such changes or is otherwise responsible for the child pornography found on defendants' devices. Dkt. 62-1, Ex. 5, Declaration of Special Agent Daniel Alfin, *United States v. Matish*, No. 16-cr-016, Dkt. 74-1 at 5,¶ 9.

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2. Nothing about the affiant's description of the habits of child pornography collectors was misleading.

Here too, Tippens makes a very large mountain out of a very small molehill. With one exception addressed below, Tippens does not take issue with Deputy Shook's assertions about child pornography collectors generally. Rather, he claims the affidavit misled the magistrate judge by not identifying the unique characteristics of Tor users. Those characteristics—a somewhat greater degree of technical sophistication and increased sensitivity to security and detection by law enforcement—are not inconsistent with a desire to collect child pornography, however. It just means they may do it more carefully. Tor users are not unique in their desire to avoid law enforcement detection; they anonymity it provides may just give them a leg up.

Just as important, much of what Tippens claims was withheld from the magistrate judge was actually apparent on the face of the affidavit. Magistrate Judge Strombom must have been aware that "candygirl123" was no ordinary offender. The investigation involved an anonymous network and a website accessible only to those who went to fairly significant lengths to access it. And as detailed in the affidavit, the website itself cautions members to be vigilant and protect their identities. Tippens understandably might have drafted the affidavit differently and asked the magistrate judge draw different inferences. Such differences do not, however, a *Franks* violation make.

It is also no answer for Tippens to recycle his claim that Deputy Shook misled the court about whether Playpen's content was downloaded to "candygirl123's" computer. Second MTS at 15-16. He did not, and it was. Tippens just disputes where that content would have been stored and the likelihood and ease with it would have been accessible after the fact. While TorBrowser's security features certainly make it more difficult to analyze a user's browsing activity after the fact, they do not make it impossible. Even those who use TorBrowser to conceal their activities may still leave a trail that can be followed by a skilled forensic examiner. *See* Powers Declaration ¶¶ 9-17.

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Regardless, there is nothing groundbreaking about the notion that someone who actively views child pornography on a website dedicated to the topic and is actively logged into that site for many hours over several months is interested in and possesses child pornography. Tippens posits as an article of faith that a Tor user who accesses child pornography must necessarily confine his or her behavior to that domain, avoiding the dangers that other activity might entail. Plainly, the experience of law enforcement is otherwise: collectors tend to collect. Aside from "candygirl123's" Playpen activities—strong evidence in and of itself—Deputy Shook set forth in great detail why, given the characteristics common to such individuals, there was good reason to believe that evidence would be found in Tippens's home, a conclusion with which the magistrate judge agreed. Tippens may not agree with Deputy Shook's conclusion, but he cannot simply dress his disagreement up as a *Franks* violation and insist on suppression.

United States v. Weber is not to the contrary. Tippens suggests that reliance on a collector profile is problematic because the Ninth Circuit has criticized such boilerplate in affidavits. Second MTS at 15-16 (quoting *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1990)). Perhaps unsurprisingly, Tippens has overlooked something important: *Weber* grounded its criticism in the absence of a factual nexus between the collector profile and the target. *Id.* at 1345. That concern is not at play here. A user's "continuous, affirmative steps to access a child pornography website can hardly be compared to the single controlled buy in *Weber* two years after his initial, and unconsummated, foray into child pornography." *Gourde*, 440 F.3d at 1074. Nor, as in *Gourde*, is the deficiency identified by *Weber* present here: Deputy Shook "specifically identified the circumstances linking the collector profile" to "candygirl123." *Id.* *Gourde* long ago put to rest the notion that probable cause demands "concrete evidence" when there are sufficient facts to support a reasonable inference that a target possesses child pornography. *Id.* The Court should decline Tippens's invitation to find otherwise.

Finally, Tippens's observations about the "habitual deleter" phenomenon change nothing. Second MTS at 16-17. In his view, the fact that there are some child

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pornography collectors who, for various reasons, engage in a cycle of collection and deletion renders Deputy Shook's statements about child pornography collectors misleading. He is wrong. First, the affidavit speaks in generalities about characteristics that are common among offenders. The statements concern probability, not certainty, and they are not cast in terms of absolutes. That a rule of thumb has exceptions does not render one's assertion of that rule of thumb misleading after all. Moreover, a "habitual deleter" is still actually a collector of sorts. At any given time depending on where that offender is in his or her cycle of collecting and deleting, it is reasonable to conclude that there will either be evidence of child pornography or evidence of recent efforts to obtain it, particularly where digital evidence is concerned. That is hardly inconsistent with the statements contained in the affidavit.

Simply put, Tippens may not like the conclusions Deputy Shook drew from the evidence or that the magistrate judge agreed with them. But that does not mean that the information in the affidavit was misleading.

3. Tippens's moving inventory was immaterial to the finding of probable cause, and its omission was the product of neither an intent to mislead nor recklessness.

Tippens's household goods inventory is utterly irrelevant to the question of probable cause. Tippens makes much of the absence of any specific reference to a computer, but that is a red herring. Even if that information were somehow significant, an examination of the inventory in its entirety shows why Deputy Shook was right to dismiss it as irrelevant. Any suggestion that Deputy Shook acted with the intent to mislead or with recklessness is thus nonsensical.

To be sure, knowing that the inventory did not specifically reference a computer would have told the magistrate judge just that. But it would not have altered her calculus on probable cause. Digital devices are imminently portable. Laptops, tablets, and smartphones can be carried in luggage or on one's person with ease. The same is true for inexpensive and compact external storage devices capable of storing vast amounts of

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data. And indeed, most people, not just offenders prefer to keep such devices close at hand rather than entrust them to commercial movers, particularly if the contents are precious. Child pornography collectors, as Deputy Shook explained, are no different.

Surely, "candygirl123" would not have relished dropping a collection of child pornography in a moving box and waiting weeks to be reunited with it. And if "candygirl123" had, it only stands to reason a security-conscious collector might choose not to identify that cargo any more than necessary. Boxes can get lost or be delivered to the wrong address. Even without the collector profile to provide context, the magistrate judge would have had no trouble concluding that the moving inventory was meaningless, but that should put to rest any question whether that information is immaterial.

Furthermore, even a cursory review of the inventory itself shows why Deputy Shook saw it is irrelevant. True, there is no computer listed in the inventory. However, there is plenty to indicate that the household had a computer or two. The inventory includes two Dell printers, Dkt. 129, Exhibit E at TIPPENS_000691, 695; multiple desks and desk chairs, *id.* at TIPPENS_000695-699; and a "comp. mat," *id.* at TIPPENS_000696. It hardly makes sense to have two printers, multiple desks, and a computer mat and no computer. No mental gymnastics are required to conclude those computers must have traveled with their owners. Then there is the safe, which certainly could have provided a secure and discrete location for a child pornography collection. *Id.* at TIPPENS_000697.

Quite reasonably, Deputy Shook believed that someone who spent hours logged into a site dedicated to child pornography over several months and actually accessed graphic child pornography on multiple occasions was likely to be interested in child pornography and still in possession of child pornography a year later. It's certainly conceivable that the absence of a computer was evidence that the Tippens's family had elected to eschew technology and adopt a simpler existence. But Deputy Shook can hardly be faulted to thinking that unlikely given the multiple flat screen televisions and video game systems that were going to be joining the family in Washington. Notably, the

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inventory said nothing about a child pornography collection either, but surely Tippens would not think that a material omission. The same is true of the absence of the word computer. Deputy Shook can likewise not be faulted for thinking that someone who had amassed a prized collection of child pornography would not easily commit items of such value to the vagaries of a commercial move when he or she could as easily do the moving.

In short, even if Tippens were correct that the information about the inventory could have affected the magistrate judge's analysis (it could not), there is no credible argument that Deputy Shook omitted it in an effort to mislead or was otherwise reckless. He had every reason to see it for what it was: irrelevant. And nothing Tippens says supports a contrary view.

4. The unsupported conclusion of an FBI attorney is likewise immaterial to the finding of probable cause, and its omission was neither reckless nor the result of an intent to deceive.

Nor is the unsupported and plainly erroneous statement of an FBI attorney concerning whether to proceed with an investigation relevant to the magistrate judge's determination of probable cause. Federal prosecutors, not agency counsel, are tasked with determining whether there is probable cause to support a search warrant request in the first instance. And that determination ultimately rests with the reviewing judge. The views of an FBI attorney are irrelevant.

More importantly, what is clear from the evidence and search warrant affidavit is that Playpen user "candygirl123" accessed child pornography and did so from Tippens's home in Hawaii. Any suggestion by Mr. Lang that the inference that SFC Tippens accessed child pornography is "extremely low and tenuous at best" is preposterous. Mr. Lang's conclusions about the inferences to be drawn are demonstrably incorrect. Plainly, he lacked critical information or the expertise to understand it or both. In any event, his conclusions are meaningless.

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And what might sharing his conclusion possibly have done to alter Magistrate Judge Strombom's analysis? Nothing. Her task would have been the same even if she had been aware of Mr. Lang's opinion: that is, she was required to assess whether the affidavit stated probable cause to support the requested search. It would surely have come as no surprise to her that someone could reach a different conclusion than she, which is the most that Mr. Lang's ill-considered and unsupported opinion could have told her. He offered no explanation for his position, so it is difficult to understand how sharing that position with the magistrate judge could have shaped her analysis.

For largely the same reasons, there is no reason to believe Deputy Shook acted with intent to mislead or in reckless disregard for the truth when he did not disclose Mr. Lang's remarks in the affidavit. Deputy Shook reviewed the investigative file, consulted with technical experts and those familiar with the underlying Playpen investigation, prepared a detailed affidavit setting forth the evidence, and submitted it to a federal prosecutor for review and approval. He had no reason to think the obviously wrongheaded and ill-informed musings of an attorney who has no role in deciding whether to approve a search warrant would bear on the magistrate judge's finding of probable cause. He was right, and even if he were wrong, he certainly cannot be accused of drafting an intentionally or recklessly misleading affidavit.

C. The good faith exception precludes suppression.

Under the good faith exception to the exclusionary rule, suppression is improper where officers rely in good faith on an objectively reasonable search warrant issued by a neutral and detached judge. *United States v. Leon*, 468 U.S. 897, 900 (1984). This objective standard is measured by "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate judge's authorization." *Id.* at 922 n.23. Ordinarily, "a warrant issued by a magistrate . . . suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *Id*. at 922 (quotation marks omitted). The Supreme Court has explained, "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in

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those unusual cases in which exclusion will further the purposes of exclusionary rule." *Id.* at 918. The Court identified only four circumstances where exclusion is appropriate: (1) the issuing magistrate judge was misled by the inclusion of knowing or recklessly false information; (2) the issuing magistrate judge wholly abandoned the detached and neutral judicial role; (3) the warrant is facially deficient as to its description of the place to be searched or the things to be seized; or (4) the affidavit upon which the warrant is based is so lacking in indicia of probable cause that no reasonable officer could rely upon it in good faith. *Id.* at 923-24.

None apply here. The warrant affidavit contained no knowingly or recklessly false information that was material to the issue of probable cause. Nor does Tippens allege that the issuing magistrate judge abandoned her judicial role or that the warrant did not clearly and particularly described the locations to be searched and the items to be seized. And the affidavit offered a strong factual basis to support the magistrate judge's probable cause finding. The agents' reliance on the warrant after it was issued by the magistrate judge was objectively reasonable, and any defects claimed by Tippens, if they in are defects at all, would not justify suppression. *See Massachusetts v. Sheppard*, 468 U.S. 981, 989-90 (1984) ("[W]e refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested"). "The Supreme Court's goal in establishing the good-faith exception was to limit the exclusionary rule to situations where the illegal behavior of officers might be deterred. *United States v. Gantt*, 194 F.3d 987, 1006 (9th Cir. 1999). There is nothing to deter here, and Tippens's motion should be denied.

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IV. CONCLUSION

For all the foregoing reasons, the Court should deny Tippens's motion to suppress.

DATED this 6th day of February, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant.

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